UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

	§	
	§	MASTER FILE NO. 4:15-CV-13-DAE/DF
IN RE: BRAZOS ROCK, INC. – FLSA	§	
LITIGATION	§	APPLIES TO ALL ACTIONS
	§	

PLAINTIFFS' JOINT OPPOSED MOTION TO CONSOLIDATE FOR ALL PURPOSES, OR, IN THE ALTERNATIVE, FOR CORRECTIVE NOTICE AND SANCTIONS

COME NOW Plaintiffs Edward Glenn Lewis, Don Brewster , Mark Morton, and Iram Galindo (collectively, "Plaintiffs"), on behalf of themselves and the two conditionally certified collective actions of similarly situated current and former employees, and submit this, Plaintiffs' Joint Opposed Motion to Consolidate for All Purposes, or, in the Alternative, for Corrective Notice, and for Sanctions (the "Motion"), respectfully showing as follows:

I. INTRODUCTION

This Motion seeks relief for the **thirty-nine (39)** opt-in plaintiffs whose potential damages will be affected in connection with the inadequate class lists submitted to counsel for Plaintiffs by Defendant Brazos Rock, Inc. ("Brazos Rock" or "Defendant"). In short, Defendant submitted two deficient class lists to counsel for Plaintiffs in the consolidated actions. (*See* **Ex. A** – Defendant Class List Deficiency Chart). As a result of Defendant's conduct, and as explained further, 39 of the 232 opt-in plaintiffs have submitted their consent to join either in the wrong action, or in only one action when they have a right to damages in both. At this point, the actions are consolidated for pretrial purposes, but Defendant will unjustly benefit from its failure to comply with Court orders in presenting class lists to include *all* individuals who worked out of two of its locations if the cases are allowed to proceed to trial separately. Unsurprisingly, Defendant is now opposed to consolidating the actions for trial purposes, given that class sizes will inevitably shrink should Defendant be allowed to sever out those individuals who are involved in the wrong action.

While Plaintiffs believe the most elegant solution to the problem of Defendant's actions would be to consolidate the *Lewis* and *Galindo* cases for all purposes (including trial), at a bare minimum the FLSA statute of limitations must be equitably tolled for those who have opted-in to the wrong suit, and corrective notice must issue. Should the Court choose this path, Defendant should be made to pay for costs incurred with correction. Sanctions may also be appropriate.

II. PROCEDURAL HISTORY

Plaintiffs have conditionally certified two classes of plaintiffs in this FLSA overtime case – those working out of Defendant's Midland, Texas yard and those working out of Defendant's Kermit, Texas yard. Plaintiffs who worked for Brazos Rock in Kermit were first to conditionally certify a collective action.[1] In connection with that certification, Defendant was ordered to present address information for *all* hourly paid individuals who worked out of Kermit in the three-year period prior to the issuance of the order permitting notice.[2] Notice issued on October 27, 2015. (**Ex. B** – Email from Opposing Counsel ("OC") transmitting class list). Plaintiff Galindo was second to conditionally certify a collective action of *all* hourly paid individuals who worked for Defendant out of Midland.[3] Notice in the *Galindo* action issued on December 14, 2015. (**Ex. C** – Email from OC transmitting second class list). The two cases were consolidated for pre-trial purposes by agreed motion at Defendant's request.[4] As shown below, it is now apparent that despite the Court's specific order to produce two, separate class lists for *all* putative class members who worked out of Kermit and one for *all* who worked out of Midland, Brazos Rock failed to include dozens of employees who should have received notice.

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[1] *See* ECF No. 34, entered October 14, 2015.

[2] *Id.*, pp. 14, 19. ("Because Plaintiffs have demonstrated a basis for conditional certification, the Court **GRANTS** their Motion for Conditional Class Certification and defines the class as:

> All employees of Brazos Rock, Inc. who were based and worked out of its facility in Kermit, Texas, and paid at an hourly wage and [sic] at any time during the period from [three years prior to the date of this Order] to [the date of this Order].").

In the course of discovery, Defendant presented Plaintiffs with payroll information for each opt-in plaintiff in both the Kermit and Midland case, outlining remuneration paid and locations worked. The records produced were voluminous. The initial production consisted of a spreadsheet which contained 54,445 lines of data, or 690 pages of printed material. (BRES_FLSA 0024-0713, not attached, produced on April 29, 2016). The Parties proceeded toward mediation which was originally scheduled on May 25, 2016. However, Defendant made significant alterations to the original production, adding an additional 488 lines of data (183 pages of additional document production). (BRES_FLSA 0714-1586, not attached, produced on May 18, 2016). Mediation had to be cancelled because those alterations impaired the Parties' present ability to calculate damages. The Parties rescheduled mediation for July 12, 2016.

Defendant continued to edit the substance of the payroll data until the eve of the rescheduled mediation. (BRES_FLSA 1587-3132, not attached, produced on July 8, 2016; **Ex. D** - Email of July 11, 2016 from OC re: opt-in plaintiff Rhonda Brewster omitted from production). For instance, the first two proffered payroll reports showed opt-in plaintiff Joel Amado as having worked in Kermit for the weeks of 07/20/15 - 08/10/15, yet in the third production (offered to

[3] *See* ECF No. 54, entered on , p. 1 ("all current and former non-exempt workers employed by Defendant Brazos Rock, Inc. who worked out of the Midland yard during any workweek between November 30, 2012 to the present.").
[4] *See* ECF Nos. 40 & 43.

Plaintiffs approximately three and one half months from the initial production) nearly a month's worth of work was lost. (*See* **Ex. E** – Amado Comparison).[5] Nonetheless, the Parties attended mediation with Defendant's assurance that the final data was in hand. Mediation was unsuccessful.

The day after mediation, Defendant further eroded the credibility of its records. Defendant admitted that certain opt-in plaintiffs who Defendant insisted be removed from the case for not working in either region *had in fact worked in Midland or Kermit* during the relevant three-year statutory time period. (*See* **Ex. F** – Email of July 14, 2016 from OC re: failure to produce certain records). Defendant equitably stated that it would not oppose reinstatement of those individuals into the lawsuits, and produced records on July 14, 2016. (*Id.*). However, counsel for Plaintiffs are *still* finding that opt-in plaintiffs who Defendant claimed should be removed from the case do in fact have potential damages. As of yesterday, counsel for Defendant produced new payroll information for opt-in plaintiff Luis A. Vazquez. (*See* **Ex. G** – Comparison between July 8 production and Email from OC re: Luis A. Vazquez).

Given the voluminous production, the frequent changes in underlying data, and the density of data, analysis of damages from Plaintiffs' position took a significant period of time. Accordingly, it was not until August 13, 2016, that counsel for Plaintiffs discovered the extent of the inadequacies of the class lists originally sent to counsel for Plaintiffs in this action.[6] Upon close scrutiny, it is apparent that names of certain putative class members who solely worked in the Kermit yard were identified by Defendant in the Midland class list as having worked solely out of the Midland yard, and vice versa. For example, by Defendant's records, opt-in Plaintiff

[5] Counsel for Plaintiffs confirmed this was not an error; Defendant claims these weeks were worked at another location, although the original production shows they were worked in Kermit, Texas. (*See* **Ex. E**, Amado Comparison).

[6] Counsel for Plaintiffs will submit the class lists under seal at the Court's direction.

Eduardo Lopez worked solely in Midland. (*See* Appendix, Ex. 1). Curiously, Eduardo Lopez filed his consent to join the Kermit case. (*See id.*). Upon investigation, Eduardo Lopez's name was included in the first submitted Kermit class list, but was omitted from the subsequently produced Midland class list. A summary of the errors listed on **Ex. A** – Defendant Class [7] is included in Plaintiffs' Arguments and Authorities Section, and includes thirty others.

III. ARGUMENTS AND AUTHORITIES

A. Relevant Standards

1. Consolidation

> When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

FED. R. CIV. P. 42(a). Courts have broad discretion to order consolidation and may even consolidate *sua sponte*. *See Morrison v. Amway Corp.*, 186 F.R.D. 401, 402-03 (S.D. Tex. 1998) *citing Frazier v. Garrison I.S.D.*, 980 F.2d 1514, 1531 (5th Cir. 1993). A court's decision regarding consolidation is reviewed for abuse of discretion. *See Frazier*, 980 F.2d at 1531.

Notably, Defendant has conceded that the Kermit and Midland cases were suitable for consolidated pre-trial treatment, admitting many factors considered in connection with consolidation motions. (*See* ECF No. 40).

2. Corrective Notice in FLSA Cases and Tolling Statute of Limitations

[7] Pursuant to Fed. R. Evid. 1006, Exhibit A, Defendant Class List Deficiency Chart, is presented as a summary of voluminous writings, recordings, or photographs. The underlying data are the payroll records produced by the Defendant and the class lists produced by the Defendant. Plaintiffs are filing today a separate Appendix with relevant excerpts of the payroll data to demonstrate accuracy, as necessary. Plaintiffs will submit the class lists under seal at the Court's direction. Defendant may controvert the accuracy of any part of the summary chart in further briefing.

"Because class actions present special opportunities for abuse, courts have broad authority to govern the conduct of both counsel and parties in FLSA collective actions." *Pacheco v. Aldeep*, 127 F. Supp. 3d 694, 697 (W.D. Tex. 2015) (Ezra, J.). While courts generally issue corrective notice where defendants make improper direct communications, corrective notice is appropriate whenever a defendant improperly discourages participation in joining the suit. *See, e.g.*, *id.* Courts may award attorney fees sustained in bringing a motion for corrective notice, and order a defendant to pay for the issuance of corrected notice. *Id.* at 695.

"The doctrine of equitable tolling preserves a plaintiff's claims when strict application of the statute of limitations would be inequitable." *Shidler v. Alarm Sec. Group, LLC*, 919 F. Supp. 2d 827, (S.D. Tex. 2012) *citing United States v. Patterson*, 211 F.3d 927, 930 (5th Cir. 2000). In support of a motion for equitable tolling, a plaintiff must show that a "plaintiff has acted diligently and the delay in filing a notice of consent concerns extraordinary circumstances." *Id.*

3. Sanctions

A court "has the inherent power to issue sanctions when a party or attorney acts in bad faith." *Word of Faith World Outreach Center Church, Inc. v. Morales*, 143 F.R.D. 109, 114-15 (W.D. Tex. 1992) (Sparks, J.) *citing Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-46 (1991). Imposition of sanctions is reviewed for abuse of discretion. *Chambers*, 501 U.S. at 55.

B. Summary of Issues with Class Lists.

1. Opt-in Plaintiffs Who Worked in Midland and Kermit, but Whose Names Were *Only* Provided in the Kermit Case (Under Inclusive).

Without redress, the following individuals will be unfairly denied potential damages, because they worked in both Midland and Kermit, but Defendant failed to produce their names in the Midland class list[8]:

- R. L. Roberson
- Carlos Rangel
- Lupe Rangel
- Esteban Zavala

(*See* **Ex. A**, Defendant Class List Deficiency Chart).

2. Opt-in Plaintiffs Who Worked *Only* in Midland, but Whose Names Were Provided in the Kermit Case (Over and Under Inclusive).

Certain names were provided in both the Midland class list and the Kermit class list (or, worse, *only* in the Kermit list), although the individuals worked *only* in Midland. As a result, the following opt-in plaintiffs who only worked in Midland, likely out of confusion, only opted-in to the Kermit case (which was the first notice issued), or never received appropriate notice and may be unfairly severed although they have potential recoverable damages in the Midland case:

- Eduardo Lopez (only produced in Kermit class list)
- Eleazar Garcia (only produced in Kermit class list)
- Alfredo Garcia
- Fernando Michel
- Jason Michel
- Barry Turnbull

(*See* **Ex. A**, Defendant Class List Deficiency Chart).

3. Opt-in Plaintiffs Who Worked *Only* in Kermit but Whose Names Were Produced *Only* in the Midland Case (Under Inclusive).

Defendant presented the names of many individuals who only worked in Kermit only in the second issued Midland class list. It would have been proper to inform counsel for Plaintiffs in the Kermit case that the names had been inadvertently omitted from the class list and allow issuance of a second round of notices. However, that did not occur. Rather the names were just

[8] This under-inclusion is particularly egregious given that the names were offered in the first class list production and withheld in the second.

produced in the wrong case. Now the following opt-in plaintiffs who only have recoverable damages for their work done out of Kermit are stranded in the Midland case:

- Darryl Adkins
- Landon D. Allen
- Erasmo Avila-Villarreal
- Clayton D. Anderson
- Edgar A. Cavazos
- Villado B. Chavez
- Saul Mercadi
- Perry Kirk Beavers
- Jose Avitia
- Rhonda Brewster
- Rafael Salcedo-Vega
- Homero Villarreal Adame
- Bobby Burcham
- Mario A. Garza

(*See* **Ex. A**, Defendant Class List Deficiency Chart).

Furthermore, these opt-in plaintiffs missed out on several months of potential damages, given that notice issued in the Kermit case approximately two months before the Midland case. (*See* **Exs. B & C**)

4. Opt-in Plaintiffs Who Worked in Kermit and Midland, but Whose Names Were Produced *Only* in the Midland Case (Under Inclusive).

Similarly, certain opt-in plaintiffs who worked in both locations were not initially presented in the Kermit class list, and are left in the Midland case only. Their damages are subject to decrease if the cases are not consolidated for all purposes.

- Lance Campbell
- Rondal Cory Johnson
- Cesar Perez
- Librado Velasquez
- Christopher Williams
- Gonzalo Robles-Corral
- Cesar O. Chavez
- Jose A. Lira
- Orlando Trevino
- Geronimo Mendez
- Javier Salinas
- Heriberto Martinez
- Martin Garcia Lopez

(*See* **Ex. A**, Defendant Class List Deficiency Chart).

5. Possibly Harmless Error: Individuals Whose Names Were Produced in Both Class Lists but Only Worked One Location

Plaintiffs present these names only to the extent they show the inconsistencies that riddle Defendant's class lists, the opt-in plaintiffs' damages are not at stake. However, they may have payroll information that was not produced, given Defendant initially presented them in both lists:

- David W. Cotton
- Israel A. Duarte
- Juan Gonzales
- Travis Griffith
- Jamie Hannan
- Jorge Ortiz Zuniga
- Tommy Pack
- Clyde Smith
- Ramsey Joe Gamez
- Jose Romero
- Jose H. Montalvo
- Josue Adrian Juarez
- Gino Martinez
- Jaime Solis
- Baley Allen Rogers

(*See* **Ex. A**, Defendant Class List Deficiency Chart).

6. Worst Case: Individuals Who Appear on Neither Class List

By Defendant's records these individuals have potentially recoverable damages, but their names were not produced on either class list.[9] Others may exist whose names were not produced by Defendant who were, therefore, not given the opportunity to participate:

- Miguel Angel Cantu Gamez (opted-in to wrong case)
- Ruriy Gonzales (*See* **Ex. A**, Defendant Class List Deficiency Chart)

C. Consolidation of the Two Cases is an Easy Solution Which Would Benefit Plaintiffs Otherwise Prejudiced By Defendant's Inadequate Class List Production.

The simplest solution, reducing the burden on the Parties and the Court in terms of costs (see corrective notice, below) and attorney time in separating all of the misplaced opt-ins, would be to consolidate the cases for all purposes, including in the order a provision that all filed consents to join will be considered as timely filed in both actions on the date they were filed. In the event a client has submitted two consents to join, the first filed will control. *See Frazier v. Garrison I.S.D.*, (holding"[consolidated] actions maintain their separate identities," which necessitates the provision regarding consents to join considered filed in both cases).

[9] Plaintiffs recognize that many individuals have similar names in this case. If Defendant can demonstrate that these names were presented to counsel for Plaintiffs, albeit in different format or different spelling, Plaintiffs will withdraw this point.

If not, damages assessments at summary judgment and trial will be extremely complicated with issues of severing opt-in plaintiffs and considering which weeks were worked at which location, whether those weeks were in the two-year mandatory recoverable period or the three-year "willful" recoverable period; all issues which could have been avoided if Defendant had initially produced proper class lists, per Order of this Court. Moreover, the parties would still have to address the manifest injustice of individuals who thought they were proper parties given they received notice of a collective action, but would not receive damages because they were in the wrong case, but here on an individual basis. Economies favor of a class-wide resolution.

D. Alternatively, Corrective Notice Must Issue, the Statute of Limitations Must Be Equitably Tolled, And Plaintiffs Must Be Given the Opportunity to File Consents to Join in Appropriate Cases.

If Defendant maintains its position that consolidation is not proper, the only remedy for the inadequate class lists will be to toll the statute of limitations for those opt-in plaintiffs involved in the wrong action (or not involved in both), and reissue notice, giving the opt-in plaintiffs the opportunity they should originally have been afforded to opt-in to the proper action.

Although "[e]quitable tolling applies only in 'rare and exceptional circumstances"[10] – this is such an "out of the ordinary" situation. Indeed, in searching for authority, Plaintiffs were unable to find any factually similar cases resolving the issue of what should happen when a Defendant produces two patently inadequate class lists in related FLSA actions. Plaintiffs believe they were "actively misled by the defendant" in this situation. *See Teemac*, 298 F.3d 457. However, the statute of limitations has been tolled when defendants required more time to produce a class list, so the requested relief is not totally unprecedented. *See Misra v. Decision*

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[10] *See Shidler* 919 F. Supp. 2d at 830, *quoting Teemac v. Henderson*, 298 F.3d 452, 457 (5th Cir. 2002).

One Mortg. Co., LLC, 673 F. Supp. 2d 987, 998 (C.D. Cal 2008) (delays in producing names which were no fault of plaintiffs supported equitable tolling). The opt-in plaintiffs were diligent in pursuing their claims and should not be penalized for Defendant's conduct.

As there was no wrongdoing on the part of Plaintiffs or opt-in plaintiffs, and it took significant attorney time to identify issues, Plaintiffs should also recover attorneys' fees incurred with this Motion. This Court recently awarded attorney fees and costs of mailing when corrective notice was required. *See Pacheco*, 127 F. Supp. 3d at 699. Plaintiffs request the opportunity to present their attorneys' fees after a ruling in Plaintiffs' favor.[11] Plaintiffs request such other sanctions for party (not attorney) conduct which the Court determines appropriate under the circumstances.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs request consolidate the cases for all purposes, including a provision that all filed consents are considered filed in both actions on the date filed. Alternatively, Plaintiffs request corrective notice be issued, at Defendant's expense, that the statute of limitations toll from the time a consent was filed in the wrong action, and for attorneys' fees and any other sanctions or relief this Court deems appropriate.

Respectfully submitted,

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[11] Plaintiffs also request attorney fees should the Court grant consolidation, given Defendant's opposition.

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ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF CONFERENCE

On July 21, 2016, counsel for Plaintiffs requested Defendant's position on consolidation via email. On July 26, 2016, counsel for Defendant responded that Defendant was not amenable to consolidating the cases for all purposes.

s/Melinda Arbuckle
Melinda Arbuckle

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded to all counsel of record via ECF notification on this the 16th day of August 2016.

s/Melinda Arbuckle
Melinda Arbuckle